STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE COHEN,

Plaintiff-Appellant,

v

REDCOAT TAVERN, INC.,

Defendant-Appellee.

UNPUBLISHED
October 3, 2006

No. 269044
Oakland Circuit Court
LC No. 2005-065315-CZ

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff first argues that the trial court erred in setting aside a default judgment against defendant, whose owner inadvertently put the complaint in a drawer instead of forwarding it to defendant's insurance carrier. Defendant's owner explained that her father had recently passed away, and that during the relevant time period she had been attending to her father's estate and continuing to run her business. In addition, defendant's owner indicated that her adult son had undergone major surgery.

A default judgment may be set aside "if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). A reasonable excuse for noncompliance can establish good cause sufficient to warrant setting aside a default judgment. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229-230; 600 NW2d 638 (1999). Plaintiff asserts that merely being busy and "personal issues" involving the death and sickness of others are not valid excuses. Further, plaintiff argues that defendant ignored letters advising of the impending claim before suit was filed, and did not immediately respond when provided with the notice of default or the motion for entry of default judgment. Our review is for a clear abuse of discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003).

In the context of discussing a default judgment, our Supreme Court stated in *Alken-Ziegler*, *supra*:

> "It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been." [*Alken-Ziegler, supra* at 228, quoting *Scripps v Reilly*, 35 Mich 371, 387 (1877).]

We cannot conclude that the trial court abused its discretion in setting aside the default judgment against defendant in this case. The trial court did not "widely and injuriously" depart from the realm of reason by excusing the misplacement of an envelope during a period of two or three months when defendant's owner was faced with a parent's death, the administration of an estate, and a son's major surgery. Moreover, an approximate two-week delay in forwarding default papers to one's attorney is not so egregious that it would defeat a finding of good cause. We find no clear abuse of discretion.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant. We disagree.

We review de novo a trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 120. In reviewing such a motion, the affidavits, pleadings, depositions, admissions, and other evidence must be viewed in the light most favorable to the party opposing the motion. *Id*.

To enter defendant's restaurant, patrons must pass through an outer door into an unlighted vestibule. Inside the vestibule there is an inner door that leads directly into the restaurant. A small sign posted near the handle of the outer door states "watch your step" to alert patrons of the elevated threshold in the outer doorway. Plaintiff went to the restaurant for lunch and tripped on the elevated threshold. Because someone was holding the outer door open for plaintiff, she did not see the warning sign. Plaintiff concedes that the raised threshold was open and obvious. Nonetheless, she asserts that the threshold, in conjunction with the restaurant's inadequate lighting, constituted an unreasonably dangerous condition on defendant's premises.

An invitor must warn of hidden defects, but is not required to protect against or warn of open and obvious dangers unless he or she should have anticipated the harm despite the invitee's knowledge of the risk. *Ghaffari v Turner Construction Co*, 473 Mich 16, 21-22; 699 NW2d 687 (2005). Thus, an invitor must warn or protect invitees against an open and obvious condition only if special aspects make the open and obvious condition unreasonably dangerous. *Id*.; *Lugo v Ameritech Corp*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). To determine whether a risk of harm is unreasonably dangerous, a court must consider whether special aspects exist. *Id*. at 517-518. Such special aspects include dangerous conditions that are unavoidable or which pose an unreasonably high risk of severe injury. *Id*. at 518-519. For example, an unguarded thirty-foot deep pit in the middle of a parking lot would pose an unreasonably high risk of injury. *Id*. at 518. In contrast, an ordinary pothole would not pose an unreasonably high risk of injury. *Id*. at 520.

Here, the raised threshold was in plain view, and like most conditions at ground level, would have been noticed had plaintiff been observant. Plaintiff suggests that the dim, red-tinted lighting inside the restaurant, coupled with the lack of lighting in the vestibule, created a special aspect within the meaning of *Lugo, supra*. We cannot agree. Plaintiff fell while entering the vestibule, and the lighting inside the restaurant and vestibule was therefore irrelevant. Regardless of the nature of the lighting inside the vestibule and restaurant, the raised threshold was visible from outside the restaurant, before the outer door was ever opened. Moreover, plaintiff concedes that her fall occurred during daylight hours. Accordingly, the lighting in the vestibule and restaurant had no impact on plaintiff's ability to observe or detect the elevated threshold in the outer doorway. Plaintiff also suggests that because the interior of the vestibule was dark, she was looking straight ahead in an attempt to see where she was going. She therefore contends that her attention was diverted from the ground level. However, the raised threshold had been directly ahead of plaintiff at all times as she approached and began to enter the restaurant's vestibule. Had plaintiff been paying attention, she surely would have seen the raised threshold at some point before reaching the outer door. The elevated threshold simply did not create an "unreasonably high risk of severe harm" within the meaning of *Lugo*.

Plaintiff also argues that the defendant violated a duty by failing to comply with a Building Officials & Code Administrators (BOCA) regulation, adopted as a Royal Oak city ordinance, which required that all doors swing over level surfaces. In light of this alleged ordinance violation, plaintiff contends that the open and obvious danger doctrine is inapplicable. However, in order to assign liability for a BOCA code violation, there must be a special aspect related to the alleged code violation that gives rise to an unreasonable risk of harm. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003). Indeed, "[n]ot all BOCA code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine." *Id*. "The critical inquiry is whether there is something unusual about the [condition] because of [its] character, location, or surrounding conditions that gives rise to an unreasonable risk of harm." *Id*. Here, plaintiff failed to establish a genuine factual dispute regarding whether the outer doorway and elevated threshold posed an unreasonably high risk of harm. *Id*. at 578-579. Because there were no special aspects associated with the open and obvious condition in this case, plaintiff's reliance on the alleged code violation is misplaced.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper